

DECEMBER 7. 1765.

[Lord ALEMOOR Reporter.]

INFORMATION

F O R

ALEXANDER Earl of Galloway, and
JOHN Lord Gairlies, Defenders;

A G A I N S T

JOHN BULMAN, Attorney in Morpeth,
Pursuer.

MR. BULMAN, as administrator of *James Aitkenfon*, late of *Morpeth*, gentleman, deceased, brought an action in this court, setting forth in his libel, "That in the year 1760, the Lord *Gairlies* having
" offered himself as a candidate to represent the borough of
" *Morpeth* in parliament, and being desirous to intrust the
" management of his election to a person properly acquainted with the constitution of the borough, and the
" different freemen and their qualifications, he made choice
" of the now deceased *James Aitkenfon*, attorney in *Morpeth*,
" for managing this affair; which choice, the Earl of *Galloway*, his father, was pleased to approve of, and confirm by several letters holograph of his Lordship, addressed to Mr. *Aitkenfon*: That for above the space of a year,
" during

“ during which Mr. *Aitkenfon* had the whole management
 “ of this election for Lord *Gairlies*, which was sharply con-
 “ tested, there being feveral other candidates, he applied
 “ himfelf with fuch diligence and affiduity to this affair,
 “ that he entirely neglected his other bufinefs as an attor-
 “ ney, which was very confiderable, and, in the end, car-
 “ ried the election for Lord *Gairlies*, and procured him a
 “ feat in parliament, contrary to the expectation almoft of
 “ every perfon, and foon after died, the fatigue of this bu-
 “ finefs not a little contributing to his death, which hap-
 “ pened before fettling the accompts of his deburfements
 “ in carrying on and managing the faid election, or his re-
 “ ceiving any gratification for his trouble and lofs of time
 “ in that affair: That the faid *John Bulman*, the purfuer,
 “ having been appointed adminiftrator of the faid *James*
 “ *Aitkenfon*, the accompts between the faid Earl and Lord
 “ *Gairlies*, and *James Aitkenfon*, for his deburfements, came
 “ to be cleared and fettled by the purfuer; in which ac-
 “ compts he gives their Lordships credit for the money re-
 “ ceived, and debits them only with the money expended,
 “ without making any charge for Mr. *Aitkenfon*'s agency
 “ and trouble in managing the election; and, in January
 “ 1762, the faid Earl having paid the purfuer the balance
 “ of deburfements due by the faid accompt, the purfuer dif-
 “ charged him of the whole articles thereof: That after this
 “ clearance, the purfuer expected that the faid Earl and
 “ Lord *Gairlies* would make fome grateful and adequate re-
 “ turn to Mr. *Aitkenfon*'s heirs, fuitable to the great pains
 “ and trouble he had been at, as their agent and attorney,
 “ in managing the faid election; but their Lordships fentence
 “ on this head, for above a twelvemonth after the faid clear-
 “ ance, obliged the purfuer to make a demand on them:”
 And therefore, and in refpect of the defenders refusal to
 comply with the faid demand, concluding, That the de-
 fenders fhould be decerned to make payment to the purfuer
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of the sum of 500 *l. Sterling*, in name of agency, and for the said *James Aitken*'s trouble, loss of time, and fatigue in managing the said election, and of 100 *l. Sterling* as expence of process.

This action came of course before Lord *Alemoor* as Ordinary, who, at first calling, "appointed the pursuer to give July 3d,
1764. "in a condescendence of the trouble Mr. *Aitken* had a-
"nent Lord *Gairlies*'s election." This condescendence and answers were followed with mutual memorials; and, upon advising these, the Lord Ordinary was pleased to take the cause to report, and ordained parties to give in informations: This is accordingly offered on the part of the defenders.

This process must, at first view, appear to be of a singular nature; and there is good reason to presume, that if the pursuer had got any encouragement to hope for success in such a claim in *England*, it would not have been made the subject of trial here; especially as Lord *Gairlies*, the person properly interested, has his ordinary residence in *England*, and, tho' a member of the House of Commons, would there, as well as here, have declined to plead his privilege of parliament. As for the Earl, his father, he has been very improperly made a party in this process, as he had no further concern in the matter which gives rise to it, than as having acted or corresponded occasionally for Lord *Gairlies* when he happened to be absent.

The history of the borough of *Morpeth* is pretty well known. A noble family, possessed of a large estate in its neighbourhood, had obtained such influence in it, that members supported by their interest, had been regularly returned by the corporation. The freemen of the borough, sometime previous to the late general elections, begun to entertain an apprehension from thence, and other circumstances, that their liberty was in danger, and that they were not treated in so respectful a manner as they deserved.

served. The love of liberty, and a desire of independency, heated by that apprehension, soon raised, and daily increased the spirit of opposition in the corporation. This opposition was strenuously promoted by Mr. *Aitkenson*, who, tho' himself not a freeman, was a man of consequence in the borough, and distinguished himself so eminently in the cause, that he was regarded by every one as the leader. Whether any other motives concurred to influence his conduct in that respect, the defenders cannot take upon them to say. It is probable he considered it as a popular cause; and that his distinguishing himself in support of it, might be the means of raising his character, and rendering him a man of weight and consideration: But, be that as it will, it is an undoubted fact, that he was fully more interested in the success of the opposition, than any of the freemen themselves.

To such a height had this political spirit inflamed the minds of the freemen and inhabitants of the borough, that any candidate, in opposition to the old interest, tho' of rank inferior to Lord *Gairlies*, would at that period, have been received in *Morpeth* with open arms: All that the opposition wished for, was to get candidates who had fortune sufficient to defray the expence of such a contest. In this situation, Major *Mitford*, a gentleman of the neighbourhood, offered himself as one candidate; but the party had still difficulty to find another, as it was not every person who would engage in opposition to such powerful interest, or who could afford to do so. Major *Mitford* happened to be in *Scotlaud* at this critical juncture, and having heard that Lord *Gairlies* was desirous of obtaining a seat in parliament, he proposed that his Lordship should join him in standing for the borough of *Morpeth*, and strongly importuned him on the subject.

Lord *Gairlies*, who at that time had other views, positively declined to engage himself in an affair where the expence
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was certain and the issue dubious, unless it could be made appear, that he had the greatest probability of success. To clear up all doubts upon this point, the Major proposed a meeting at *Kelfo* with some of the freemen and other leading men of the party.

A meeting was accordingly held there in *June 1760*, where *Mr. Aitkenson* with several of the freemen attended, to whom *Lord Gairlies* was then an entire stranger. At their earnest importunity, and relying on their assurances that it was extremely easy to prevail, at a time when the aforesaid noble family was at variance with the freemen, and that the expence of his election would be very inconsiderable; *Lord Gairlies* agreed to offer himself as a candidate along with *Major Mitford*. As *Mr. Aitkenson* on this occasion seemed to be the most intelligent and active man of the party, for whom he was the chief speaker at the conference, his Lordship chose to correspond with him, rather than with any of the others. Hence many letters passed between *Mr. Aitkenson* and the defenders, in the course of the canvassing preceeding the election, altho' *Mr. Aitkenson* never was formally appointed agent, attorney or manager for *Lord Gairlies*, more than *Mr. Crawford*, *Mr. Weatherhead*, and several others of the party. These gentlemen were equally zealous and industrious as he, tho' influenced by no other motive than that of publick spirit, and for them, consequently, as freemen, *Mr. Aitkenson* might as properly have been stiled a manager and agent, as for *Lord Gairlies*. *Major Mitford* too, was equally interested with *Lord Gairlies* at the beginning, but his affairs soon fell into such a situation, that he was obliged to quit the field, and thereby the whole weight and expence of the opposition devolved on *Lord Gairlies* and his friends.

At the same time, *Lord Gairlies* does now, as he always did, heartily acknowlege, that he was extremely obliged to *Mr. Aitkenson* for his activity on that occasion, and he did accordingly often express his sense of it in the course of their correspondence. But *Mr. Aitkenson* never did signify

to either of the defenders, directly or indirectly, his expectation of receiving any pecuniary reward from his Lordship; nor have the defenders any reason to believe, that he ever entertained any thought of it, far less did he ever make such a stipulation, or engage in the party on condition of his being paid in that manner. All that he ever signified as to any views of return was, that he hoped for Lord *Gairlies's* interest in getting him appointed a master in chancery. He was indeed well qualified to have performed the duties of one of the twelve ordinary masters, had he been called to it; and as for the extraordinary ones, who are dispersed over the whole country of *England*, every attorney of character may well pretend to that trust; and Lord *Gairlies* was actually negotiating for Mr. *Aitkenson* this step of promotion at the time of his death.

But while Lord *Gairlies* does here frankly acknowledge the merit of his deceased friend, yet he cannot do his other friends the injustice, as to allow him the whole merit of his success. He had many other friends in that borough of all ranks and professions, as well unfreemen as voters: He has mentioned the names of some of them who were no less zealous and diligent in his favour, and in support of the cause, to which he owed his election. To all of them he owns his most grateful obligations; but none of them have thought of maintaining such a claim against him as the present.

Neither is there any foundation in fact, for what the pursuer has alledged, that Mr. *Aitkenson's* attention to this affair made him neglect his other business, and occasioned the waste of his constitution by intemperance, and his contracting the disease of which he died. Such an averment is apparently injurious to the respectable character of that gentleman. The affair itself gave no occasion for such destructive consequences. Tho' the borough is pretty large, yet the number of freemen intitled to vote, was only about 50; and consequently, the election was carried by 26. Of this
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last number, 20 had declared for Lord *Gairlies* from the beginning; so that the gaining over to his interest, only about five or six of the residue, who were from the beginning wavering in their resolution, was all that was necessary, and cannot be presumed to have produced such effects on a man of Mr. *Aitkenson's* good sense and discretion; especially, when his Lordship's other friends bore their share in the trouble. The death of Mr. *Aitkenson* is what the defenders most sincerely regret, as in him Lord *Gairlies* lost a friend, who, he is persuaded, had a real regard for him, and attachment to his interest. But he is happy in being assured, by what Mr. *Aitkenson* himself told him, that his affairs were not the cause of his illness, but that it proceeded from a cold he caught in going to *Durham*, and attending the *Pole* at the election there, which lasted for many days.

Some weight too has been laid by the pursuer on this circumstance, that Mr. *Aitkenson* was by profession an attorney; and on this a presumption is endeavoured to be grafted, that he interested himself in the hopes of a pecuniary reward. But it surely cannot be maintained, that all attornies without exception are so mercenary in their disposition, and so little regardful of publick or political views, that they can engage on no side in such an affair, without expectation of payment in this way. It may on the contrary be said, that scarce a man of any profession residing in an *English* borough, is proof against the infection of party, and embracing one side or other, from publick and more laudable views. In this case, almost every man in the burrow of every profession, was engaged on one side or other. Indeed, considering Mr. *Aitkenson's* good character, and the influence he had in the burrow, it is much more natural to suppose and believe, what was truly the fact, that he exerted his influence in behalf of Lord *Gairlies*, as the candidate, who, at the solicitation of himself, as well as others, had offered upon the side of the party which he had espoused, and of which he had the honour of being a leader,

leader, than that he did so merely from expectation of payment, in the way of his private profession.

But further, had there been any foundation in fact for what is so alledged, surely this pursuer, or some others, would have heard Mr. *Aitkenson* express, at some time, his having such expectation; or, as he was a man accurate in business, there would have been some entry in his books, or accompts, relative to this reward, especially, as he had occasion to make large debursments for his friend Lord *Gairlies* in this affair. It is not, however, pretended, that any entry, note, or memorandum of that kind, has been found in his whole books, accompts, or writings, neither has it been hitherto alledged, that he ever did so much as in words signify to any body, his expecting to receive a pecuniary gratification. And, indeed, what puts this point beyond doubt, and shews the real apprehension entertained by the pursuer himself, the near relation and administrator of the defunct, concerning it, is, that after Mr. *Aitkenson's* death, he settled accompts with the Earl in behalf of his son, as to Mr. *Aitkenson's* debursments, and whole concern in the *Morpeth* election, and did grant a discharge and acquittance of these accompts, without claiming, or so much as mentioning, any fee or reward, as being over and above due to the deceast for his alledged agency.

It is even acknowledged in the libel itself, that the pursuer never made such a claim or demand, till a year after that settlement and discharge. This affords real evidence, that the extravagant claim now made, for no less than 500 *l.* on that ground, over and above all other expences, has not proceeded from any knowledge or apprehension had at that time by the pursuer (who is himself an attorney, and inhabitant of the borough) that either, from the concern which the deceast took in that matter, or from the nature of his profession or business, or from any thing he ever signified or expressed, any such fee was due or expected, but

but must have taken its rise merely from an after thought of the pursuer himself, or the suggestion of some other person.

It is likewise material to observe, that as it is commonly thought proper to have the assistance of an attorney at taking a pole in an *English* election, so at this very election of *Morpeth*, Lord *Gairlies* paid no less than a brace of other attornies, for attendance and assistance there, besides a council, and very good fees to them were particularly stated in the accompt above mentioned, cleared with the pursuer himself. This fact has been all along admitted, and it strongly corroborates what has been mentioned, for showing, that Mr. *Aitkenson* meant not to act in the sphere of an attorney, but merely as a friend to Lord *Gairlies*, and the interest upon which he stood.

The pursuer has talked of supporting his claim, by the import of many letters from both the defenders; but the only one he has thought fit to produce, is a letter from the Earl to Mr. *Aitkenson*, of date the 27th *August* 1760, concluding in these words: "My son and I have had already such proofs of your friendship and activity, that we trust and depend intirely upon your management; you may be assured of all the grateful returns in our power." This passage does very properly express the defenders sense of Mr. *Aitkenson's* friendship, and it promises such returns as a friend might expect; and which, had Mr. *Aitkenson* lived, the defenders would have seized every opportunity of making. But those words cannot bear the construction of importing an engagement to give a pecuniary reward, such as is now demanded. This letter is not wrote in the language of an employer writing to his attorney, or one who had engaged as his servant, in the way of his profession; it is, on the contrary, suited to one, who was acting independently, as of influence in the party, and supporting the interest upon which the candidates stood.

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Accordingly,

Accordingly, the letter likewise contains compliments to other gentlemen by name, upon the same side, and to the other friends who had met with Lord *Gairlies* at *Kello*, and signifies his readiness to wait upon them whenever his presence should be thought of any use.

Having thus fully stated the facts in this cause, and obviated sundry of the pursuer's arguments, the defenders shall now conclude with submitting the following objections to this claim:

1mo, That the deceased Mr. *Aitkenson* was not employed by either of the defenders, as an agent, factor, or attorney. There is no evidence whatever, either already brought, or offered to be brought, of any mandate or commission having been given to him by them, or either of them, so as to intitle him to claim, as of right, any fee or gratification, far less such an enormous sum as is here libelled. The nature of the business in which he engaged, cannot imply, or presume a commission to have been given him, such as can found this claim, seeing it was a matter of publick, as well as private concern. With equal reason, every man in the borough, who could prove, that he openly espoused the same party, and spoke for, or solicited, and *a fortiori*, if he voted for the candidate, might prosecute him for a fee or reward proportionable to his services. Such claims, if sustained, would be ruinous to the person elected, inconsistent with the idea of free elections, and contrary to law and justice.

2do, Neither is this claim competent upon the footing of Mr *Aitkenson*'s having been a *negotiorum gestor* for Lord *Gairlies*. The same plea might be put in by every one of his friends in this election: Besides, a *negotiorum gestor*, even tho' he prove that he managed the business *utiliter*, is only intitled to *indemnification*, that is, to recover the necessary and useful expences he has debursed, and upon which sometimes interest is allowed him, *L. 2 et 27. ff. de. neg. gest.* But

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he is not intitled to any fee or reward over and above ; and in the practice of *England* there are authorities going so far on this point, (contrary indeed to equity) as even to deny indemnification of expences to one who has intermeddled in the management of another's affairs without a special mandate. The defenders however, have willingly indemnified the pursuer of every thing that could be claimed in that way ; and they are satisfied that no further pecuniary reward for trouble was expected, or would have been demanded by the defunct, for the reasons already explained.

Dyer's Rep.
p. 76. § 38,
39.

3thio, Supposing there were here sufficient evidence of the defunct's having acted as an agent or mandatary in this matter ; yet, according to the rules of the civil law, *Mandat* is a gratuitous contract, whereby the mandatar is supposed to undertake the business from friendship and goodwill, and, consequently, no fee or reward is held to be due to him, unless it is proved to have been expressly stipulated. At the same time, the defenders acknowledge that this rule has been so far departed from in modern practice, that in respect to particular circumstances, and the nature of certain employments, a fee or reward for services performed, has been found due without stipulation. Such is the case of physicians, and of attornies or agents, when employed in the proper business of their profession, namely, that of managing law suits in courts of justice. Yet it is submitted, if in the present case the defunct can be held to have been properly an agent, and not to have acted entirely from public spirit, and on an independent footing. But supposing him to have meant to act as an agent, still the business he undertook, was of such a nature, as might well have led him to have made a previous stipulation for reward from those for whom he acted : And as no such thing was done, he must be supposed to have acted *gratuitously*, or, at least, he could not be better founded in this claim against the

the person elected, than against every one of the electors, or others of the same party.

And *lastly*, as the pursuer has come in place of Mr. *Aitkenson* to all intents, so his discharging the accounts of expences incurred by the defunct, and taking payment of the balance, without any reservation of his title to a gratuity or reward for trouble, and without so much as mentioning it for above a year thereafter, must, *per se*, effectually bar this claim. It might be held either as an admission by the party himself, that no such thing was due, and that the service was intended to be gratuitous, or as a virtual discharge of any demand on that head. Lord *Bankton* delivers his opinion " That if the agent or factor has accepted of a discharge of his intromissions, without reservation of a gratuity for his pains, he cannot demand thereafter a salary." So too it was explicitly determined in a case observed by President *Falconer*, 5th January 1683, *Graeme contra Rochead*. *Graeme* had for many years been chamberlain to *Murray of Melvan*, and had got his accounts cleared and discharged. He afterwards pursued the executor for his salary: But it was pleaded in defence, that as no paction relative to the salary was proved, so his claim to it was barred, by fitting his accounts, and accepting a discharge of his intromissions. The Lords accordingly sustained the defence, and *assolizied the defenders*. If such has been found to be the effect of an agent's accepting a discharge from his employer, without reservation; *a fortiori*, a discharge granted by the agent to his employer, upon a regular accounting, without any claim of a fee, or reservation of it, ought to have the like effect.

In respect whereof &c.

DAV. RAE.